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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

## No. 601

MABEL G. REINECKE, formerly Collector of Internal Revenue for the First District of Illinois,

*Petitioner,*

*vs.*

KENNETH G. SMITH and FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## BRIEF FOR RESPONDENTS IN OPPOSITION.

---

### Opinion Below.

The United States District Court for the Northern District of Illinois filed no opinion. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 95) is reported in 61 F. (2) 324.

## Jurisdiction.

The judgment of the Circuit Court of Appeals was entered October 7, 1932 (R. 97). The petition for a writ of certiorari was filed January 7, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## Question Presented.

The question is whether, under Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924, (a new provision), the grantor of trusts created in 1922 was taxable in 1924 on the income of the trusts which he did not receive, and could not have received unless the trusts had been revoked (and they were not) prior to the earning of the income, such revocation in each case being possible only if consented to by one of two trustees of the trusts, one of whom was a beneficiary and the other a public trust company.

## The Statute Involved.

Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924, provides as follows:

> "Sec. 219 (g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable years shall be included in computing the net income of the grantor." (U. S. C., Title 26, Sec. 960.)

## Statement.

The facts are set out in the declaration and are admitted by demurrer (R. 83).

In 1922 Douglas Smith created five trusts for the benefit of his wife and children. The trustees of each trust from the date of its creation until October 22, 1924, were Douglas Smith, his son, Kenneth Smith, who was also a beneficiary under each trust, and Foreman Bros. Banking Company, a public trust company organized under the laws of the State of Illinois (R. 3, 4, 10). Douglas Smith, the grantor, was not a beneficiary under any of the trusts and had no right to receive or dispose of any of the principal or income and never directly or indirectly received any of the same (R. 7, 8, 9, 10).

In each trust instrument, it was provided that the trusts might be revoked by Douglas Smith with the written consent of either one of the other two trustees, being Kenneth Smith, who was also a beneficiary, and Foreman Bros. Banking Company, the public trust company. This provision, the same in each instrument, was as follows (R. 7):

> "Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

On October 22, 1924, Douglas Smith resigned as trustee from each trust and the above provision for the revocation or modification of the trusts was in each case eliminated (R. 8).

The only controversy between the parties to this suit is with respect to the income of the five trusts from January 1 to October 22, 1924, which Douglas Smith under compulsion included in his individual income tax return for 1924 and on account of which he paid Petitioner, under protest and duress, income taxes in the sum of $59,896.51 more than he would have otherwise been required to pay (R. 8, 9). Douglas Smith individually never received any of said income, neither to his own use nor for his benefit, directly or indirectly, and never exercised any control over the same (R. 7, 8, 9, 10). The income in question was in fact received by the trustees of the trusts and was distributed to the beneficiaries according to the trust indentures (R. 10).

At the time the trusts were created in 1922 the Bureau of Internal Revenue had ruled and was holding that income of trusts such as those here in question, even of trusts revocable by the grantor *alone*, was not taxable to the grantor. Section 219 (g) was new in the Revenue Act of 1924 which was approved June 2, 1924.

## Argument.

It is respectfully suggested that this case is not one which warrants consideration by this Court. It is an isolated situation and pertains only to the income from January 1, 1924 to October 22, 1924, the provision in controversy having been eliminated from the trusts on the latter date.

We do not concur with Petitioner that the only question is one of the constitutionality of the section in question. There are questions of construction which would dispose of the case.

The trusts were created in 1922 long prior to the passage and approval, on June 2, 1924, of the 1924 Act. They could not be revoked by the grantor, alone. The consent of a third person, a trustee of the trusts, was required and the gifts passed as completely from the enjoyment and control of the grantor in 1922 as if the gifts had been absolute. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346, 347; *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2) 14, (C. C. A., 2nd); *White* v. *Erskine*, 47 F. (2) 1014, (C. C. A., 1st); *Hill* v. *Nichols*, 18 F. (2) 139 (D. Ct., Mass.). See *Commissioner of Internal Revenue* v. *McCormick*, 43 F. (2) 277, 278, 279, (C. C. A., 7th), and *McCormick* v. *Burnet*, 283 U. S. 784, reversing same.

With respect to such trusts, Section 219 (g) must be construed as having only prospective application and to apply only to trusts created after the passage of the Act, in order to avoid the constitutional objection. *Blodgett* v. *Holden*, 275 U. S. 142, 148, 149; *Lewellyn* v. *Frick*, 268 U. S. 238, 251, 252.

By its terms Section 219 (g) does not apply even prospectively where the consent of a beneficiary is required for revocation. The exception is grounded on the fact that in such case the grantor has parted with his enjoyment and control. In legal contemplation, the required consent of a trustee, as the representatives of the beneficiaries, must be given the same status as a required consent of a beneficiary and for the same reason. Section 219 (g), properly construed, does not apply to trusts of either character. *White* v. *Erskine*, 47 F. (2) 1014, 1016, *supra*.

This court has already decided the constitutional question if Section 219 (g) be held by its terms to apply to the gifts made by Douglas Smith in 1922, prior to any imposition of such tax and when no similar tax existed. *Nichols* v. *Coolidge*, 274 U. S. 531, 542, 543; *Untermyer* v. *Anderson*, 276 U. S. 440. See also *Hill* v. *Nichols*, 18 F. (2) 139, *supra*. The Circuit Court of Appeals simply followed those cases in its decision. The Court said (R. 97):

> "When an attempt is made to apply those measures to past lawful transactions by which the grantor has parted with control over the trust fund and has made it impossible to regain such control by his own act, a different question arises. Under the broadest conception of legislative power, that which is not the income of the taxpayer and which it is impossible for him to make a part of his income may not be required arbitrarily to be included in his income. Such an attempt amounts to confiscation and offends the fifth amendment."

When the trusts here in question were created in 1922, the Bureau had ruled and was holding that even the income

of trusts revocable by the grantor, *alone,* was not taxable to the grantor (*Law Opinion* 1102, *C. B.* 1-2, p. 50).

To refuse to construe Section 219 (g) as excepting from its operation trusts revocable with the consent of a trustee for the beneficiaries, notwithstanding that it excepts from its operation trusts revocable with the consent of beneficiary, would require that that section be held unconstitutional as applied to such trusts, even as to those created after the passage of the Act. That which is in fact not the taxpayer's income or property and which it is beyond his power to take to himself can not be made such by calling it his and any attempt to measure the tax on his income or property by the property or income of another is not taxation but spoilation, and violates the due process guaranteed by the Fifth Amendment. No supposed necessity of getting the Government more taxes can justify the otherwise unconstitutional exaction. *Heiner* v. *Donnan,* 285 U. S. 312, 326; *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, 215.

It is clear that both as a matter of construction and on the constitutional ground the decision in this case is in strict accord with all the decided cases of this and the other Federal Courts. Respondents know of no court decision involving similar facts that is contrary, and Petitioner mentions none. The decision in this case in no way conflicts with the decision of this Court in *Corliss* v. *Bowers,* 281 U. S. 376. That case involved a trust in which the grantor had, by himself, the "unfettered" power to revoke at any time and the decision was put squarely on that ground, the court saying (p. 378):

> "The income that is subject to a man's *unfettered* command and that he is free to enjoy at his *own option* may be taxed to him as his own income, whether he sees fit to enjoy it or not." (Italics supplied.)

When a man at will may reach out his hand and take to himself property and the income thereof, the property and income are, for all practical purposes, as much his as if he had retained them in his immediate possession. To tax a man upon the income of such property for any taxable year, even though for a year after the date of the creation of the trust, is giving the statute no retroactive operation. And such a tax is of course within the power of Congress to lay. But it is otherwise where, as in the case at bar, the gift passed out of the settlor's enjoyment and control upon the creation of the trusts long prior to the imposition of the tax.

The case of *Porter* v. *Commissioner*, No. 466, October Term, 1932, now pending before this Court and referred to by Petitioner, is in no wise analogous to the case at bar. That case involves the imposition of an estate tax or death duty where the grantor retained in himself, *alone*, the *unfettered* power to make whatever disposition of the property he desired, save, only, that he could not recall it to himself. It follows that one of the principal attributes of ownership remained in the settlor until the moment of his death, and, by a like token, at his death there ripened for the beneciaries an interest on which an excise on the right to receive property at death might be laid.

The termination at death of a power of appointment may be the subject of a death duty or succession tax. The case at bar concerns an income tax and one upon income which the person sought to be taxed did not receive and could not have received after it was earned. In order to have received the income, it would have been necessary for a trustee, who had a duty to protect the trust, to have in effect made a gift, in advance, of the

corpus of the trust to the person sought to be taxed. Alone, the grantor had no such power.

Everything said above with respect to Section 219 (g) applies with the same force to Section 219 (h) referred to by Petitioner in a footnote.

Petitioner states that a review of the question presented by this case is desirable in the public interest and because of its general importance. The judgment is correct for any one of the several enumerated reasons, and we do not believe that any public interest attaches to its review. As stated, it is not in conflict but in strict accord with the decisions of this Court and the lower Federal courts. It has a very limited effect, not only as between the parties but because it applies only to trusts revocable with the consent of a trustee. Respondents have been unable to find more than four such cases, and of these, only two have arisen under the Revenue Act of 1924 and subsequent Acts, with reference to trusts created prior to 1924. See *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2) 14, *supra*; *White* v. *Erskine*, 47 F. (2) 1014, *supra*; *Hill* v. *Nichols*, 18 F. (2) 139, *supra*; *Joseph H. Bromley, Jr., et al.* v. *Commissioner*, 26 B. T. A. 878. The last cited case decided by the Board of Tax Appeals is the only case found by Respondents which does not support the judgment in the case at bar. A reading of the Board's opinion reveals that the problem involved was not fully comprehended and that the Board thought *Corliss* v. *Bowers* determinative of the question. The decision of the Board is now pending on review in the Circuit Court of Appeals for the Third Circuit.

Inasmuch as the decision in the case at bar applies only to trusts created prior to the 1924 Act and of necessity only to those where the grantor is living, it becomes of

less and less significance by the passage of time since the 1924 Act was passed.

Even under the Revenue Acts of 1924, 1926 and 1928, (the provisions of the Revenue Act of 1932, Section 166, are substantially different), the only decision which could be of any real importance would be with respect to a trust, revocable with the consent of a trustee, which was created *after* the passage of the 1924 Act.

Since the result in this case is obviously correct and in accord with the decided cases, and since the question is not so important as to require further review in the public interest and is of importance only as to the parties hereto and as to them, only for the period January 1st to October 22, 1924, it is respectfully submitted that the petition for a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit in this case should be denied.

Respectfully submitted,

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## BRIEF FOR RESPONDENTS.

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### Question Presented.

The question is whether, under Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924 (a new provision), the grantor of trusts created in 1922 was taxable

in 1924 on the income of the trusts which he did not receive and could not have received unless the trusts had been revoked (and they were not) prior to the earning of the income, such revocation in each case being possible only if consented to by one of two other trustees, one of whom was a beneficiary and the other a public banking and trust company.

In other words, may a person be subjected to a direct tax measured by the income of another?

In reaching a conclusion, two questions must be decided:

*First*: Does Section 219 (g) apply to trusts which can only be revoked with the written consent of a trustee?

*Second*: If Section 219 (g) does apply to such a trust, is it constitutional, particularly when applied to a trust created prior to its enactment and prior to the time that such a provision was in legislative contemplation?

## Statement.

The facts are set out in the Declaration (R. 2-80) and are admitted by demurrer (R. 83).

In 1922, Douglas Smith created five trusts for the benefit of his wife and children. The trustees of each trust from the date of its creation until October 22, 1924, were Douglas Smith, Kenneth G. Smith, his son, who was also a beneficiary under each trust, and Foreman Bros. Banking Company, a public banking and trust company organized under the laws of the State of Illinois (subsequently, Foreman-State Trust and Savings Bank) (R. 3, 4, 10). Douglas Smith, the grantor, was not a beneficiary under any of the trusts and had no right to receive or dispose of any of the principal or income and never directly or indirectly received any of the same (R. 7, 8, 9, 10).

In each trust instrument, it was provided that the trusts might be revoked by Douglas Smith with the written consent of either one of the other two trustees, being Kenneth G. Smith, who was also a beneficiary, and Foreman Bros. Banking Company, a public banking and trust company. This provision, the same in each instrument, was as follows (R. 7):

> "Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Douglas Smith alone had no power to revoke or modify any of said trusts (R. 10). The Declaration alleged (R. 10, par. 16 (erroneously printed 61)) that the Foreman-State Trust and Savings Bank was entitled to receive compensation from each of said five trusts, and "was a representative of and was acting for the beneficiaries of said five trusts." It was also set out in the Declaration that Kenneth G. Smith, the other trustee, was a direct beneficiary under one trust and a contingent beneficiary under the others.

Each trust provided that the securities transferred to and belonging to the trustees should be deposited and remain with the trustee, the Foreman Bros Banking Company (R. 56, 61, 66, 71, 78). Each trust also provided that in case of a vacancy in the trusteeship, the other trustees must name a successor and that at all times one of said trustees must be a bank or trust company of the City of Chicago (R. 7, 58, 63, 68, 73, 80).

Shortly after the creation of the trusts, in November, 1922, each of the trusts except one was modified by eliminating a provision for the payment of all taxes by the trustees (R. 59, 64, 69, 74). One of the trusts for the benefit of

the wife was modified to provide that the trust was in lieu of dower. The modification recited that such was the intent of the grantor and it was so understood by his wife (R. 59). On October 22, 1924, the grantor resigned as trustee and the trusts were so modified that thereafter Douglas Smith had no right, even in conjunction with another trustee, to revoke or modify (R. 8). All of the above corrections and changes were made with the written consent of one of the other trustees, as provided in the instruments.

Douglas Smith was subjected to a tax on all of his own income for 1924, at the graduated rates applicable thereto, and in addition, he was compelled to pay an additional amount measured by the income of the trusts for the period January 1st to October 22nd, 1924, at rates applicable to incomes in excess of his own income (R. 8, 9). The income so used as a measure of the exaction was never received, either directly or indirectly, by Douglas Smith (R. 7, 8, 9, 10). Douglas Smith could not have received any part of the income unless another one of the trustees consented to join him in revoking the trusts prior to the earning of the income.

## The Statute Involved.

Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924, provides as follows:

> "Sec. 219. (g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable years shall be included in computing the net income of the grantor." (U. S. C., Title 26, Sec. 960.)

## Summary of Argument.

Section 219 (g), properly construed, includes trustees under the term "beneficiary of the trust". *White* v. *Erskine*, 47 F. (2d) 1014, 1016 (C. C. A. 1st). The intent and purpose of the exception inserted in the section was to exclude trusts which could not be revoked except with the consent of an adverse interest, such as a beneficiary or a trustee. A trustee, like the beneficiaries, is an adverse interest. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346; *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2d) 14 (C. C. A. 2nd); *Hill* v. *Nichols*, 18 F. (2d) 139; *Stewart* v. *Commissioner*, 27 B. T. A. ..... (Jan. 31, 1933). Unless so construed, Section 219 (g) is unconstitutional in that it taxes one person upon the income of another, contrary to the decisions in *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, and *Heiner* v. *Donnan*, 285 U. S. 312. A construction of a statute which makes it unconstitutional, or which even raises a grave doubt as to its constitutionality, will be rejected. In fact, this Court has said that language had been "strained" to

avoid a construction making a statute unconstitutional. *Blodgett* v. *Holden,* 275 U. S. 142, 148. In the construction of Section 219 (g), the word "beneficiary" must include trustees, who are in legal contemplation, and as admitted by the demurrer to the declaration in this case, the representatives of the beneficiaries. *Farmers' Loan & Trust Company* v. *Bowers, supra; White* v. *Erskine, supra; Stewart* v. *Commissioner, supra.*

Section 219 (g) does not by its terms apply to past transactions, and it has been repeatedly held that a statute will not be given retroactive effect unless its language is clear and imperative to that effect. *Shwab* v. *Doyle,* 258 U. S. 529, 535; *Llewellyn* v. *Frick,* 268 U. S. 238.

If Section 219 (g) is held to apply to the trusts here in question, it is to that extent unconstitutional and void, in contravention of the Fifth Amendment. It would thus tax one person upon the income of another. To tax the grantor on income of trusts which he never received, directly or indirectly, and which he never had any right to receive, and where his power of revocation could only be exercised with the written consent of an independent trustee, is to tax him upon the income of another. The case of *Corliss* v. *Bowers,* 281 U. S. 376, was decided solely on the basis of the grantor's unfettered continuing command or power over both the corpus and income of the trust; in other words, the ever-present, unrestricted power to receive the income was held to be in substance the same as the receipt of the income. The case has no application to the case at bar. The transfer of the property in this case was complete from the grantor to the trustees, and the accrual of income and the right thereto were in the trustees and the ultimate beneficiaries. The grantor had no right either to the corpus of the trust or to the income, except and unless an independent person or as we think in this case, a

person with an adverse interest, consented to give it to him. *Reinecke* v. *Northern Trust Company, supra.*

The mere fact that the rights of the ultimate beneficiaries may be subject to change in no way interferes with the completeness of the disposition by the grantor. *Reinecke* v. *Northern Trust Company, supra; Chase National Bank* v. *United States,* 278 U. S. 327, 336. The case of *Saltonstall* v. *Saltonstall,* 276 U. S. 260, has no bearing on the case. The Court was there dealing with a succession tax, and merely held that if the recipient of the property did not secure complete rights to it until the death in question, the perfection of the rights in the property of the beneficiary was subject to a succession tax. The distinction between the situation in the *Saltonstall* case and the case at bar was set out in the case of *Chase National Bank* v. *United States, supra,* page 336.

If, under any circumstances, Section 219 (g) can be held to be constitutional as applied to the trusts of the character of those in this case, it can only be as to such trusts created after its enactment. The trusts here under consideratiton were created in 1922, at a time when the income from trusts even though revocable solely by the grantor was not taxable to the grantor. *Law Opinion,* 1102, *C. B.* I-2 page 50. The transfer of the property to the trustees was complete and it was beyond the power of the grantor, acting alone, to secure for himself either the corpus or any part of the income. An attempt to tax the grantor on such property or on such income, which was not earned by him, never accrued to him, and which he could not alone secure, is arbitrary, capricious and void. *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; *Blodgett* v. *Holden,* 275 U. S. 142. This was the ground upon which the decision rested in the Court below.

## ARGUMENT.

### Introduction.

Taxes on incomes are direct taxes. *Pollock* v. *Farmers' Loan & Trust Company,* 158 U. S. 601. The Sixteenth Amendment removed the necessity for apportionment. It did not change the nature of the tax. There has been no attempt subsequent to the adoption of the Sixteenth Amendment to impose a tax *in rem* on income. The collection of the tax is not confined to the income itself, but becomes a personal liability against the person receiving it and may be collected from any other assets which he may have.

Every income tax has been imposed upon a person, natural or artificial, and the rate of such tax varies according to whose income it is and how much income he has. The rate on corporations is different from the rate on individuals. The rates on individuals vary with the amount of income.

It is therefore fundamental that in order to impose such a direct tax, measured by income, the income must be the income of the person sought to be taxed. In the case at bar, the income in question was subject to tax but to the true owners and recipients thereof, and only them. It cannot be taxed to a person who did not earn it, did not receive and had no right to receive it. The decisions of this court have maintained this position. Congress may impose a tax upon a person based upon *his* income. Such a tax may be imposed regardless of what disposition he may make of the income. If in fact he earned the income

or received it, it is subject to tax even though he gives it away or disposes of it either by a prior or a subsequent agreement. The test in all cases is whether or not it was his income.

The cases of *Lucas* v. *Earl*, 281 U. S. 111, and *Burnet* v. *Leininger*, 285 U. S. 136, are such cases. The basis of the decisions in these cases was that the income was earned by the person sought to be taxed. The same would be true as to income on property owned by the person sought to be taxed.

It has been no objection to the validity of a tax on income that it was applied retroactively, provided it was the income of the person sought to be taxed. In all such cases, the tax was imposed upon the person who in fact received the income. Such are the cases of *Taft* v. *Bowers*, 278 U. S. 470; *Cooper* v. *United States*, 280 U. S. 409. To the same effect is the decision in *Corliss* v. *Bowers*, 281 U. S. 376, *supra*, the court having held that under the particular facts of that case, the continuing and unfettered right to take the income in the person sought to be taxed was the same as the income itself.

On the other hand, this Court has always held invalid an attempt to tax one person upon the income of another or upon the property of another. *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, *supra; Heiner* v. *Donnan*, 285 U. S. 312, *supra; Schlesinger* v. *Wisconsin*, 270 U. S. 230. See also *Wells* v. *Commissioner*, decided February 4, 1933 (C. C. A. 8th); *Frew* v. *Bowers*, 12 F. (2d) 625. Cf. *Poe* v. *Seaborn*, 282 U. S. 101. Such is the case at bar.

Counsel for petitioner have attempted to bring this case under the decision of *Corliss* v. *Bowers*. It is respectfully suggested that in attempting to do so, they have gone

outside of, and in fact, contrary to the record. On page 5, counsel state:

> "The power of revocation was subject to no fiduciary limitations, express or implied. When exercised with the consent of the trustee, who had no interest adverse to the settlor, and was no doubt selected to do his will, it was as absolute as the power in *Corliss* v. *Bowers.*"

On page 14, it is stated that the grantor would choose a trustee who may be "trusted to carry out his wishes." Later, they speak of the trustee as a "straw man". The facts stated in the declaration and admitted by demurrer, show that one of the trustees was a beneficiary under all of the trusts in every sense of the word. The other trustee was a public banking and trust company of the City of Chicago. We do not think that counsel are warranted in the many statements in their brief that such a trustee must be considered a mere dummy or a tool for the purpose of tax evasion. Bear in mind that the trusts in this case were created and the trustees named long before the provision now under consideration was even contemplated by Congress. At the time of the creation of the trusts, there was no occasion whatever for the naming of dummy trustees. Even the income from revocable trusts was not then taxed to the grantor. The statements of counsel are in effect a charge of a fraudulent attempt to evade taxes by the use of trustees who were not in fact and in law trustees but were merely tools to do the bidding of the grantor. We repeat that there is absolutely no foundation for such statements, and that they are directly contrary to the admitted allegations of fact in the declaration (R. 9-11, Par. 15, 16). If petitioner had any basis for any such charge that the trustees were but *alter egos* for the grantor, or under some agreement to do his bid-

ding, it was her privilege and duty to set up such allegations by way of answer and let the issue be tried as one of fact. It must be presumed that she knew the contrary to be the fact and admitted the allegations of the declaration, having in mind, particularly, that she first filed a general issue and subsequently withdrew it and filed a demurrer (R. 81-83).

Counsel argue that the fact that a modification was made in the wife's trust is evidence that the trustee must be considered a mere dummy. In November, 1922, certain modifications were made in each of the trusts not here important, but in the nature of corrections. The modification in the wife's trust referred to, stated that it was in accordance with the understanding, in which event the trust instrument would have been subject to reformation in a court of equity. The recital in the modification would indicate rather that the wife consented to the modification than otherwise. The fact that a trustee consented to what he considered a correction or a fair and proper modification is, of course, no indication of what he might do under other circumstances.

It is respectfully suggested that the draftsman of a trust may not have properly performed his duty if he did not provide some method for the correction of errors or of modifying the trust due to unforeseen and changed conditions. In *People* v. *Northern Trust Co.*, 289 Ill. 475, 481, 124 N. E. 662, the court said:

> "All well-skilled and far-seeing lawyers advising for the benefit of their clients usually suggest the insertion of such a clause of revocation, * * *."

The effort, therefore, to bring the case within the doctrine of *Corliss* v. *Bowers* by assuming that the Foreman-State Trust and Savings Bank was a mere dummy is totally un-

warranted on the record. We think that we are entirely justified in considering the assumption and the argument based thereon as out of the case.

**In the proper construction of Section 219 (g), the word "beneficiary" must be held to include trustees.**

We must bear in mind that it is beyond the power of Congress to impose a direct tax on one person based upon the income of another. A construction which produces such a result should be rejected. It may well be that the words "trustee" and "beneficiary" have different meanings and are used to distinguish between the rights, duties and functions of certain parties to a trust. In the case before us, however, we are concerned with a grantor or creator of a trust, on the one side, and all those persons who have the legal and equitable rights, on the other,—the persons interested in maintaining the trust, either because of direct interest therein, or because of their legal obligations in their fiduciary capacity.

The construction which we suggest effectuates the purpose of Congress with reference to revocable trusts. If the right of revocation is subject to a prior consent of an independent third person, and particularly, of a person adversely interested, it ceases to be a power in the grantor. In effect, it is solely the power of the trustee because the consent of the prospective donee of property can be presumed. This construction avoids the constitutional objection. A construction of a statute which even raises a grave doubt as to its constitutionality will be rejected. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 348, 349; *Llewellyn* v. *Frick*, 268 U. S. 238, 251; *Blodgett* v. *Holden*, 275 U. S. 142, 148.

The grantor in this case had completely disposed of both the legal and equitable title to the property in question.

The legal title was in the trustees. True, the grantor was one of three trustees, but his sharing in the legal title as one of three trustees is distinctly different from any title which he previously had or might have as an individual. Likewise, the equitable title had been completely disposed of. It would require an affirmative written instrument by a trustee to give the grantor any interest in either the property or the income. In fact, it would require the same affirmative action to give the grantor an interest in the property as it would to give it to a stranger. It is suggested, therefore, that counsel are in error in stating that an interest in the property remained in the grantor. They have failed to distinguish between a title in the grantor individually and a bare legal title in the three trustees, of whom he was only one.

The intent and purpose of the exception inserted into Section 219 (g) was to exclude from the operation of that section trusts which could not be revoked by the grantor except with the consent of interests adverse to his, such as a beneficiary. See *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346. A trustee who has in this connection a substantial obligation to maintain and preserve the rights and interests of all the beneficiaries, is himself, of necessity, such an adverse interest, and Section 219 (g) must be held inapplicable to a trust revocable only with his consent.

That the Act is to be so construed has been decided. In a case involving Section 302 (d) of the 1924 Act (the companion estate tax section to Section 219 (g)), which is applicable by its terms to trusts which could be altered, amended or revoked by the grantor "*in conjunction with any person,*" without any exception, the Circuit Court of Appeals for the First Circuit held the Act inapplicable to a trust which could be altered only with the consent of a

trustee. The reasons given by the court were that Section 302 (d) was not intended to be broader in its application than Section 219 (g), and that Section 219 (g) excludes from its operation trusts requiring for their revocation the consent of an adverse interest, such as a beneficiary *or a trustee.* *White* v. *Erskine,* 47 F. (2d) 1014, 1016. The court said:

> "The Committee's report was as follows: 'This provision is in accord with the principle of Sec. 219 (g) of the bill which taxes to the grantor the income of *revocable trusts.*'
>
> "In other words, where a grantor, either alone or in conjunction with anyone not a beneficiary under the trust, has retained 'the power to revest in himself title to any part of the trust,' to quote from section 219 (g), then the body of the trust at the death of the decedent may be included in the value of the gross estate; but where the decedent has no such power *except by the consent of an adverse party as one of the beneficiaries, or as in this instance of the trustee for the beneficiaries,* the right of revocation is gone from the donor and also all beneficial interest for taxing purposes under section 301 of the act." (Italics supplied.)

No appeal was taken by the government from this case.

In the District Court, the court seems to have held that Section 302 (d) was unconstitutional. *Erskine* v. *White,* 43 F. (2d) 765. In doing so the court held that a trustee was an adverse interest and that the case was controlled by the principle of the case of *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, 346, *supra,* in which the trusts were revocable with the consent of the beneficiaries.

In *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2d) 14, 16, 17, *supra*, speaking of the duty of the trustee, there a trust company, with respect to joining in a power of revocation requiring its consent the court said:

> "By the indenture of May, 1916, the settlor parted with all control over the corpus of the trust, except a conditional power to revoke, and then only with the consent of the trustee. The trustee had obligations with respect to the trust property and the rights of the beneficiaries. Its consent would be granted only with due regard for such duties. Thus the settlor was beyond the power legally to control. * * *
>
> "Moreover, the consent of the trustee to revoke must be honest and in accord with the legal rights of the *cestui que trustent*. It is always subject to review by a court of equity."

In *Commissioner* v. *McCormick*, 43 F. (2d) 277, 278, 279, the Circuit Court of Appeals for the Seventh Circuit said:

> "These conditions may make settlor's power to revoke dependent upon the consent of outside parties whose interests are adverse to those of settlor. Such was the case of *Farmers' Loan & Trust Company* v. *Bowers*, * * * where the settlor could revoke only in case the trustee consented."

The decision in that case was reversed by this Court, but on grounds sustaining the irrevocability of the trust. *McCormick* v. *Burnet*, 283 U. S. 784.

The only tribunal which has held contrary to respondents' contention that the word "beneficiary" includes a trustee, is the Board of Tax Appeals, in *Bromley* v. *Commissioner*, 26 B. T. A. 878. The later case of *Stewart* v. *Commissioner*, decided January 31, 1933, however, followed

the case of *White* v. *Erskine, supra,* which held that trustees were beneficiaries within the meaning of the section in question.

The trustees in this case had a direct pecuniary interest in maintaining the trust. They were to receive compensation for their servies. This is one of the important functions of and sources of income to a public trust company.

In order, therefore, to effectuate the purpose of Congress, to avoid an unconstitutional result, and in accordance with the cases cited above, the word "beneficiary" in Section 219 (g) should be construed to include trustees.

**Retroactive Construction.**

It might be noted that Section 219 (g) does not expressly apply to trusts created prior to its enactment. When a statute is to be applied retroactively, it should be in express language. *Llewellyn* v. *Frick,* 268 U. S. 238, *Shwab* v. *Doyle,* 258 U. S. 529. In the latter case, the Court said (p. 535):

> "There is certainly in it no declaration of retroactivity, 'clear, strong and imperative', which is the condition expressed in *United States* v. *Heth,* 3 Cranch 398, 413; also *United States* v. *Burr,* 159 U. S. 78, 82-83."

Section 302 (d), the companion estate tax provision to Section 219 (g), was expressly made retroactive by Section 302 (h).

But it is stated that the income tax provisions of the Revenue Act of 1924 were retroactive to January 1, 1924, and that such a result was reached in the *Corliss* case. This contention, however, overlooks the fundamental dis-

tinction between income received by the person sought to be taxed, or income which he could have received, on the one hand, and income of another which the person sought to be taxed did not and could not receive.

The *Corliss* case treated the trust as a continuing gift, and therefore, each item of income earned by the grantor and given away as earned. It was upon such a theory that *Burnet* v. *Guggenheim,* (No. 283, Oct. Term, 1932) was decided. If the fact that a person sees fit to give away his income through the medium of a trust beyond his power to recall is the basis for an attempt by Congress to impose a tax upon him, it is in the nature of an excise or a penalty for disposing of his property, and if it can be done, must be prospective. *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440.

**If Section 219 (g) Is Held to Apply to the Trusts Here in Question, It Is to that Extent Unconstitutional and Void Because it Deprives the Grantor of Property Without Due Process of Law, in Contravention of the Fifth Amendment.**

It is not within the power of Congress to tax one person upon the income of another.

After the decision in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, reaffirmed in *Heiner* v. *Donnan,* 285 U. S. 312, we see no occasion to further discuss this principle.

The only remaining question, then, is whether or not the income from these trusts was at any time the income of the grantor. The trusts were created in 1922. The conveyance of the legal title to the trustees was absolute and complete. The disposition of the income was complete. After the creation of these trusts, the grantor, as an individual, had no legal or equitable rights in the property or the income therefrom. He could not have any interest

in the property or the income except and unless an independent third person, acting in a fiduciary capacity, should in writing give him such an interest. In exactly the same manner that the property could be given to Douglas Smith, it could be given to a stranger.

The income from these trusts which is sought to be used as a measure for taxing the grantor was income earned in 1924. Such income was never, therefore, the income of the grantor. As stated, he had no right to the income. The effort, therefore, to tax the grantor on this income is nothing more nor less than an effort to tax one person upon the income of another.

Counsel for petitioner have cited many cases of assignment of income wherein the assignor was subjected to the tax on the income assigned. In every such case, the decision rested upon the fact that the income when earned was the income of the assignor. The cases merely held that a person could not either by previous or subsequent agreement assign income which he, himself, earned or which was earned on property owned by him.

*Lucas* v. *Earl*, 281 U. S. 111, merely establishes that where a man produces income by his labor, it is necessarily his before it can be another's, because his labor is essential to its production, just as income producing property is to its income, and it may be taxed to him. In *Burnet* v. *Leininger*, 285 U. S. 136, the wife did not become a member of the partnership and the ownership of the partnership property remained unaltered. That property and the labor of the partners, including the husband, produced the income which was his first and hers afterwards.

We do not think it will serve any useful purpose to discuss in detail the many such cases cited. As stated,

they do not support petitioner's contention in this case. On the contrary, if analyzed, it will appear that where the property which produced the income was in fact assigned prior to the creation of the income, even though subject to a possible reverter, the income may not be taxed to the assignor (*infra*, page 22).

Counsel for petitioner have attempted to apply the principle of the assignment cases on the theory that the grantor retained some form or part of a title to which the income could attach as earned. Counsel are clearly in error. In this case the grantor as an individual retained no title whatever. There was a complete conveyance to three trustees, of which he was one. A title in a person as trustee is entirely different from an individual title. The income arising from the property, therefore, was the income on the property owned by the trustees, and not on property owned by the grantor.

It is upon such a premise that counsel invoke the decision in *Saltonstall* v. *Saltonstall*, 276 U. S. 260. This case arose under the Massachusetts *succession* tax. The question was not whether the grantor had retained any interest in or control over the trust property, but whether, upon the termination of a power at the death of the grantor, the beneficiaries received something which they had not had before, namely, the property freed of the power. The tax being upon the receipt of the property, could be applied when it was received, free and clear of all possible powers of removal. This Court distinguished the *Saltonstall* case in *Chase National Bank* v. *United States*, 278 U. S. 327, 336, saying that the distinction between a succession tax and a transfer tax was important because it was at least doubtful whether upon the death of the grantor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax

on transfers, since the power was not vested in him alone, but in him and another, citing *Reinecke* v. *Northern Trust Company*. In the case at bar, the legal title was in the trustees. The equitable title was vested in the beneficiaries, even though it may have been subject to a dual power to transfer to someone else, whether it be the grantor or a stranger. The fact that the beneficial interest may not have been complete and final in a beneficiary in that it was subject to change, in no way places any right or title in the grantor until such change is effected. He, alone, had no right to make the change. We think it clear, therefore, that counsel has entirely misconceived the decision in *Saltonstall* v. *Saltonstall*. Merely because the title is not complete in a certain beneficiary, it does not follow that there is a title in the grantor which carries with it the right to income.

Other cases are cited which involved estates by the entirety or joint estates. In each of them the decedent retained until his death a substantial interest in and right to enjoy the property taxed to his estate. In *Porter* v. *Commissioner*, 60 F. (2d) 673, now pending before this Court, No. 466, October Term, 1932, the grantor retained to himself *alone* a power to change the ownership which counsel might argue was part of that bundle of rights constituting complete ownership and dominion. Besides, as pointed out in *Tyler* v. *United States*, 281 U. S. 497, 503, in the special sub-sections of the Acts Congress may have gone beyond a tax on transfers exclusively. The *Porter* case could be affirmed on the ground of this sole power without in any wise affecting the decision in this case.

Counsel state that if this trust property should be taxable to the estate of the grantor under Section 302, the income should be taxable to him under Section 219 (g),

and then urge that the property would be subject to tax as a part of the grantor's estate. Of course, it does not follow by any means that the right to include property in the gross estate of a decedent is the same as the right to tax income. Property transferred in contemplation of death may be subject to a transfer tax. The test of taxability of income is always whether or not it was the income of the person sought to be taxed. Assuming, however, that counsel are correct in their premise, the conclusion does not follow. If property has been transferred and may not be recovered without the affirmative consent of a third person, it may not be taxed, as a part of the decedent's estate. No case has ever held otherwise. On the contrary, *Farmers' Loan & Trust Company* v. *Bowers, Hill* v. *Nichols, White* v. *Erskine,* and *Stewart* v. *Commissioner,* are directly to the contrary. To the same effect must be considered *Reinecke* v. *Northern Trust Company.* In *Chase National Bank* v. *United States,* 278 U. S. 327, 336, this Court said:

> "That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke* v. *Northern Trust Company,* decided this day, *post,* p. 339."

Counsel contend that the existence of the power to revoke or modify in the grantor and one of the two other trustees was tantamount to the fee of the property being in them. From both a practical and legal point of view,

that contention cannot be sustained. Where one alone has a general power, he is considered as having the fee because he can take it and enjoy it or sell it at will. But where there is a joint power, unless and until the other consents, neither has anything. From the point of view of each, it is as if the other alone held the power of appointing to him. And a person to whom property can be appointed has nothing until the power is exercised. Both practically and legally, it is then that he comes into the property. See *Sugden on Powers,* 8th Ed., p. 470, Par. 3, p. 467, Par. 33, 34. See the discussion in *Chanler* v. *Kelsey,* 205 U. S. 466. And it has been consistently held that where a gift of income producing property was subject to a condition subsequent, upon the happening of which the property was to revert to the donor, the income prior thereto was taxable to the donee, not the donor. *Nelson* v. *Ferguson,* 56 F. (2d) 121, 124, (C. C. A., 3rd), cert. denied, 286 U. S. 565, cited by counsel for petitioner; *Edson* v. *Lucas,* 40 F. (2d) 398 (C. C. A. 8th); *Shellabarger* v. *Commissioner,* 38 F. (2d) 566, 567 (C. C. A. 7th); *Bettendorf* v. *Commissioner,* 49 F. (2d) 173 (C. C. A. 8th); *Commissioner* v. *Olds,* 60 F. (2d) 252 (C. C. A. 6th). It cannot be doubted that if the donor disposes of the present right to beneficially enjoy the property, meaning its income, and retains only a right of future enjoyment, such as a remainder in fee, the income during the life of the life tenant could not be taxed to the donor, even though the life tenant might die the next day. If not in the case where he has a vested remainder, then *a fortiori* not in the case where the grantor has nothing. Counsel wholly misconceive the import of the imperfection in the interest of the beneficiaries by reason of being subject to the power. Even in the *Reinecke* case with respect to the trust revocable with the consent of four of the five beneficiaries, the interest of the fifth beneficiary is defec-

tive by reason of a possible divestiture, and yet the grantor was there held to have retained no beneficial interest in or control over the trust property. And for like reasons, the quotation taken at random from *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 53 S. Ct. 345, No. 176, Oct. Term, 1932, decided February 6, 1933, and *Bromley* v. *McCaughn,* 280 U. S. 124, 136-138, in view of the facts of those cases and the nature of the tax involved, are here inapplicable. In each of them the tax, an excise, was imposed on the taxpayer by reason of his exercise of one of the beneficial attributes of ownership which he then presently had.[1]

This case is clearly controlled by the decisions of this court in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, *supra; Heiner* v. *Donnan,* 285 U. S. 312, *supra;* and *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, *supra.* As applied to the facts of this case, if it be held to apply, Section 219 (g) violates the Fifth Amendment and is void regardless of when the trusts were created.

**A Statutory Enactment Which Is Void Cannot Be Validated Because of an Alleged Purpose to Prevent Tax Evasion.**

If, in fact, a legal and binding contract could and did exist compelling the trustee to obey the grantor's request, there is a revocable trust. If there is, in fact, collusion

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[1]Counsel for petitioner suggest that if the income is not taxed to the grantor, it escapes taxation because the statute excludes gifts and the income from moment to moment must be considered first as the grantor's income and then a gift by him. This begs the whole question. If Sec. 219 (g) does not govern, Sec. 219 (b) requires the income be taxed to the trustees or the beneficiaries. Income may validly be taxed to the person who receives and enjoys it. *Taft* v. *Bowers,* 278 U. S. 470; *Irwin* v. *Gavit,* 268 U. S. 161.

or fraud, there may be a revocable trust. If such facts exist, they must be proven. In the case at bar the contrary existed and was admitted by the demurrer to this declaration. In effect, it is argued, however, that Section 219 (g) conclusively presumes collusion or fraud or some exclusive right in the grantor. If that is the effect of Section 219 (g), it is invalid, and we think that any possible contention to the contrary was definitely set at rest in *Heiner* v. *Donnan.*

It is suggested that where the grantor selects the trustees whose consents are necessary to a revocation, there is a stronger possibility that the trust might be revoked. Possibilities, or even probabilities, do not vest title or control in the grantor. As long as the trustee has a right to refuse to give his consent, the grantor is absolutely helpless, and a tax imposed upon him would be based upon property or income which he did not own and did not have the right to take. The possibilities or probabilities are not one bit stronger than that a husband may convey property to a wife or that a wife may convey property to a husband, if, indeed, so strong. This court refused to indulge any such presumption in *Hoeper* v. *Tax Commission of Wisconsin.* In *Marshall* v. *Commissioner,* 57 F. (2d) 633, (C. C. A. 6th), *certiorari* denied Oct. 10, 1932, 53 S. Ct. 20, there was evidence of the wife that she depended entirely upon the advice of her husband in business affairs and would do as he advised her to do, and if he so desired, would give him back the property which he had given to her. It was held that the income from such property could not be taxed to the husband.

If, in fact, there is an illegal tax evasion, let it be proven and dealt with in each case. Congressional fiat, which would impose a penalty on the innocent as well as the guilty is obviously void.

**If Section 219 (g) Is Held to Apply Retroactively to the Trusts in Question, It Is Arbitrary and Capricious and Therefore Contrary to the Fifth Amendment to the Constitution.**

The income of trusts of the character of those here in question was not taxable to the grantor in 1922 when they were established, for the income even of trusts revocable by the grantor alone, was not taxable to him. *Law Opinion* 1102, C. B. I-2, p. 50.

As heretofore pointed out, in 1922, Douglas Smith completely disposed of the legal and equitable title and the right to income from the property in question. At that time, he made it impossible, by his own act, to regain any control, right, title or interest in the property.

Section 219 (g), if applied to the facts in this case, would for the first time in 1924 designate the grantor as the person to pay a tax measured by income, the right to which was thus completely disposed of by him in 1922 along with the property which produced it. Not only does Section 219 (g) tax a person upon income of another, but, if applied to the facts of this case, it would impose that tax without warning after the trust property and income therefrom had passed beyond recall.

Suppose a grantor had thus disposed of all of his property and subsequently Congress imposed upon him a tax measured by the income thereon, he could not pay the tax nor could he compel the trustees or beneficiaries to pay it for him. Suppose he had placed in such a trust his highest grade securities or investments and had retained for himself more or less speculative securities, which is not an unusual situation. The developments of the last few years have shown that the property retained by him might have become completely worthless. Nevertheless, ac-

cording to petitioner, he is subjected to a tax because of the income or the property which he had given away. A shocking result! This Court has in every instance refused to bring about such a result where the transaction which put it beyond the assignor's right of recall occurred prior to the legislative enactment and when no similar law existed.

If such a tax could be sustained at all as an excise on the making of such a gift, it can only be sustained if made after the passage of the Act with full knowledge of the consequence. The decisions of this court in *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440; and *Blodgett* v. *Holden*, 275 U. S. 142, are entirely determinative of this case. Under them, as applied to the trusts here involved, Section 219 (g) is invalid as depriving the grantor of his property arbitrarily and capriciously, in violation of the due process of law guaranteed by the Fifth Amendment. As said by the Court of Appeals in this case:

> "When an attempt is made to apply those measures to pass lawful transactions by which the grantor has parted with control over the trust fund and has made it impossible to regain such control by his own act, a different question arises. Under the broadest conception of legislative power, that which is not the income of the taxpayer and which it is impossible for him to make a part of his income may not be required arbitrarily to be included in his income. Such an attempt amounts to confiscation and offends the fifth amendment."

If it is shocking to one's sense of fairness that a man should be required to pay taxes on income which has passed out of his control, which he never received or enjoyed,

and which he cannot use to pay the tax, it is utterly arbitrary and capricious to impose such a tax without warning after the gift is made.

> "Such an exaction is not taxation but spoilation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' *United States* v. *Railroad Co.,* 17 Wall. 322, 326." *Heiner* v. *Donnan,* 285 U. S. 312, 327.

## CONCLUSION.

The tax paid by respondents' testator on account of the 1924 income of the trusts here in question was exacted and collected by petitioner without warrant of law, and the judgment for respondents should be affirmed.

Respectfully submitted,

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## APPENDIX.

### Statutes Involved.

The Revenue Act of 1924, c. 234, 43 Stat. 253, 277, 304, contained the following provisions:

"Sec. 219. * * *

"(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * *

"(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

* * *

"(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor. (U. S. C., Title 26, Section 960.)

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"Sec. 302. * * *

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;

* * *

"(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." (U. S. C., Title 26, Sec. 1094.)